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No. 98-972

IN THE

# Supreme Court of the United States

October Term, 1998

RENEE LOWERY, *et al.*,

*Petitioners,*

v.

CIRCUIT CITY STORES, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY TO BRIEF IN OPPOSITION

*Of Counsel:*

RODERIC V.O. BOGGS
AVIS E. BUCHANAN
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
1300 19th Street, N.W.
Washington, D.C. 20036

JAMES B. HAMLIN
*Counsel of Record*

DAVID J. CYNAMON
ATINA S. HARLEY
SHAW PITTMAN POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Attorneys for Petitioners*

*(Additional Counsel Listed on Inside Cover)*

February 16, 1999

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JOSEPH M. SELLERS
COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.
1100 New York Avenue, N.W.
Suite 500 West Tower
Washington, D.C. 20005

JOHN A. GIBNEY, JR.
SHUFORD RUBIN & GIBNEY
P.O. Box 675
Richmond, VA 23218

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## REPLY TO BRIEF IN OPPOSITION

## INTRODUCTION

Circuit City's Brief in Opposition ("Opp.") opens with a totally false statement: "Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred [at Circuit City headquarters.]" Opp. at 1. Petitioners not only could but did prove precisely that fact to the satisfaction of a unanimous jury in Circuit City's own back yard in Richmond. The trial court similarly found that the "totality" of Circuit City's excessively subjective promotion practices had a significant disparate impact on African Americans. Memorandum and Order of Dec. 3, 1996, at 4. The verdict and finding were based on substantial evidence that Circuit City's all-white senior managers, who openly expressed disdain for the abilities and qualifications of African Americans, implemented a system of excessively subjective procedures that prevented black employees from

being promoted to management or supervisory positions at headquarters, and buried internal reports of the discriminatory results. The company's pattern or practice of discrimination was remarkably effective. In Circuit City's 50-year history, no African American had ever held a senior management position (until one was appointed to the Board of Directors two months prior to the trial), and only four African Americans had ever risen to the rank of manager, despite the claims of Circuit City witnesses that company policy is to train and promote from within. *See* Pet. at 23 n.14. The statistical analyses of both parties' experts confirmed that these stark demographics could not be explained by any factors other than race.[1]

The notion that petitioners spent $4 million in fees and expenses to gather and present all of this evidence at a month-long trial in order to avoid their burden of proving individual claims of discrimination under *McDonnell Douglas* (Opp. at 1, 12) is ludicrous. Petitioners assumed — and discharged —

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[1] Circuit City's own expert found an imbalance in promotions favoring whites in 75 percent of the departments at company headquarters (DX 683, Table 9a). When properly aggregated, the disparity exceeds four standard deviations, well above the level deemed by this Court to demonstrate statistical significance. PX 3986, pp. 6-7; *see Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). In an effort to minimize the devastating statistics, Circuit City recycles irrelevant and misleading data presented at trial by its expert. Opp. at 2-3. For example, the contention that Circuit City hires more African Americans than the external labor pool would indicate says nothing about the company's discriminatory promotion practices, as its expert admitted. Tr. 3758-59. Circuit City no doubt hires minorities to fill its clerical positions and even occasionally promotes them within clerical positions. What it will not do is promote any of them into supervisory or management positions. The company's claim that blacks receive a substantial percentage of promotions is fundamentally flawed because its expert *excluded* from her analysis 40 percent of the promotions made during the relevant period — promotions that were made in salaried (*i.e.*, management) positions and that were therefore the most relevant promotions. Tr. 3697-3703. The jury gave such statistical sleight-of-hand exactly the weight it deserved.

a much more difficult burden: proving by a preponderance of the evidence that Circuit City's "standard operating procedure" was to discriminate systematically in promotions at corporate headquarters. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The Fourth Circuit did not conclude otherwise.

What the Fourth Circuit concluded was that neither the pattern-or-practice verdict nor the injunctive relief aimed at eliminating Circuit City's systemic discrimination could stand, solely because the district court had decertified the class action for management reasons despite the court's express statements that the class at all times met the requirements of Rule 23(a) and (b)(2). That ruling is a clear error of law, which, if not corrected, will effectively eliminate the expanded remedies under the Civil Rights Act of 1991 for victims of systemic employment discrimination. The court of appeals then compounded that error by precluding the district court from utilizing any alternative mechanism for trying pattern-or-practice claims. The Fourth Circuit's erroneous decision, as well as its related errors on matters for which it has previously been reversed by this Court, fully warrant plenary review.

## ARGUMENT

1. Circuit City attempts to avoid review of the class certification issues by portraying the Fourth Circuit's decision as a fact-based determination with no broad implications for enforcement of the civil rights laws. Opp. at 10-11. In fact, this case was based on an erroneous legal ruling that squarely presents a significant legal issue — whether the class action remains a viable procedural tool to remedy pervasive discrimination in the workplace. The district court exercised its discretion to certify the class, and the propriety of that ruling was confirmed by the pattern-or-practice verdict. But the district court then committed legal error by decertifying the class in a misguided attempt to deal with case management concerns. Circuit City suggests that the class

was decertified here only because *this particular class* was unusually "cumbersome and inefficient." Opp. at 11. The same management and efficiency issues, however, will arise in every case where employees exercise their right under the Civil Rights Act of 1991 to have a jury decide their individual claims for compensatory and punitive damages as well as their classwide claims for injunctive relief. In every such case, the same problems will arise as to the proper procedures for trying the common pattern-or-practice issues and the individual damage claims. In every case, the question of bifurcation will arise and the court will have to decide whether the classwide liability issues and the individual claims may be decided by different juries. These issues are not unique to the present case.

The importance of the question, and the need for this Court's review, are confirmed by the Fifth Circuit's recent split decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), upon which Circuit City itself relies. Opp. at 13.[2] There, the panel majority held that the individual damage claims precluded class certification under Rule 23(b)(2) or 23(b)(3). The decision below, like *Allison*, thwarts effective enforcement of the civil rights laws by making class actions essentially unusable whenever the individual employees seek damages.

Review is further warranted because the Fourth Circuit improperly grafted onto Rule 23(b)(2) the superiority and manageability requirements that appear only in Rule 23(b)(3). Despite the court's disclaimer, it is quite clear from footnote 5 of the court's opinion (Pet. App. 24a) that the district courts in the Fourth Circuit are now authorized to consider

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[2] Circuit City also cites *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). That case, however, is substantially different in that it deals with discrimination in accommodations, rather than employment, and did not involve the manageability concerns arising out of individual class members' claims for compensatory and punitive damages.

manageability and superiority in certifying and decertifying a (b)(2) class action. That result is contrary to the language and purpose of Rule 23(b)(2), which recognizes that class treatment of pattern-or-practice claims is inherently superior to other methods of adjudicating such claims. Moreover, the court of appeals acknowledged that it was weighing in on one side of a split in the circuits, citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), as a conflicting authority. Pet. App. 23a. The court even quoted the portion of the *Forbush* opinion in which the Fifth Circuit held that "questions of manageability and judicial economy are ... irrelevant to 23(b)(2) class actions." Pet. App. 23a. This, of course, is just the opposite of the Fourth Circuit's holding in the present case.[3] The discord among the circuits should be resolved.

Finally, this case is an unusually good candidate for review because it presents the class certification issues so clearly and concretely. The issues are presented *clearly* because the district court held that the class action met all of the requirements of Rule 23 and was decertified *only* because the court could not devise what it considered a fair and efficient means of trying the class members' individual claims for compensatory and punitive damages. Pet. App. 66a. Thus, the case squarely raises the issue of how to deal with individual damage claims in an otherwise proper pattern-or-practice class action. The issues are presented *concretely* because, despite the decertification order, the case was tried in essence as a liability-stage class action and resulted in specific jury determinations that Circuit City did engage in a pattern or practice of intentional discrimination and that certain of the petitioners were entitled to recover compensatory and punitive damages. The case therefore provides a robust

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[3] Circuit City argues that the Fifth Circuit resolved the *Forbush* conflict in its later *Allison* opinion. Opp. at 15 n.4. In fact, the Fifth Circuit in *Allison* actually adhered to and reinforced *Forbush*. *See* 151 F.3d at 414 n.8.

factual and legal framework in which to decide how pattern-or-practice class actions may be tried when they involve individual damage claims in addition to systemic injunctive relief.

Circuit City attempts to avoid this outcome by arguing that the class never should have been certified in the first place. According to Circuit City, it never engaged in any standardized discriminatory practice sufficient to meet the commonality required of Rule 23. Opp. at 1, 4, 7, 12. The short answer is that the courts below and the jury rejected Circuit City's argument. This comes as no surprise, since this Court and others have frequently recognized that excessively subjective personnel practices like those employed by Circuit City at its headquarters can serve as the basis for classwide liability under the antidiscrimination laws. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Green v. USX Corp.*, 843 F.2d 1511, 1533 (3d Cir. 1988); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983). The Fourth Circuit itself long ago recognized that subjective employment criteria "are always suspect because of their capacity for masking racial bias." *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975). All of the class members were subjected to — and adversely affected by — the same personnel practices, which were fostered and encouraged by the same racial animus among Circuit City's upper management. The class was properly certified initially, and the jury properly found a pervasive pattern or practice of discrimination.[4]

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[4] Circuit City harps on the trial court's rejection of the majority of the individual claims as inconsistent with a finding of systemic discrimination. Opp. at 10, 19. In fact, the inconsistency is a result of both lower courts' erroneous application of the *McDonnell Douglas* standard of proof to a case in which the petitioners both alleged and proved a pattern of discriminatory decisionmaking, and thus should have been entitled to the *Teamsters* presumption with respect to their

2. Circuit City argues that the broad injunction entered by the district court was not necessary to remedy "three isolated instances of discrimination." Opp. at 16. The argument misses the point because the injunction was intended to remedy the pervasive pattern or practice of intentional discrimination that had been found to exist throughout Circuit City's headquarters. The Fourth Circuit's conclusion that, as a matter of law, the decertification of the class for management reasons precluded entry of injunctive relief to eliminate proven systemic discrimination is neither legally nor logically supportable, and exacerbates the harm caused by its ruling on class certification.

Contrary to Circuit City's argument (Opp. at 18-19), there is ample legal authority supporting the district court's injunctive decree. In similar circumstances, other courts have entered comparable systemic injunctions. Indeed, the injunction here was based in large part on those portions of the decree affirmed by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 643-52 (4th Cir. 1978), *aff'g in part*, 16 FEP Cas. 1652 (E.D.N.C. 1976). *See also Local 28, Sheet Metal Workers Internat'l v. EEOC*, 478 U.S. 421, 481-82 (1986 (court-appointed administrator with broad powers to supervise union's compliance); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 146-47 (4th Cir. 1984) (posting notices of job opportunities, survey black employees' job interests, detailed job descriptions, periodic reports of compliance); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 498-99 (4th Cir. 1981) (development of objective promotion criteria and creation of new EEO Employee Complaints Representative position). In short, the injunction entered in this case is not an aberration, but rather is typical of injunctions generally used to eliminate systemic discrimination. What is aberrational is the court of appeals'

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individual claims. *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984).

refusal to allow the district court to remedy such systemic discrimination.

Nor was the injunction improper merely because the class was technically decertified for reasons unrelated to the requirements of Rule 23(a) and (b)(2). *See* Opp. at 19-20. The district court properly concluded that the jury could make a pattern-or-practice finding even in the absence of a certified class, and that finding by the jury clearly warranted the systemic injunctive relief. The district court held that the jury's pattern-or-practice finding was amply supported by the evidence. Pet. App. 67a-73a. The Fourth Circuit did not disturb the district court's holding. Rather, the court of appeals held as a matter of law that the pattern-or-practice finding could not stand in the absence of a formally certified class action. That holding is directly contrary to the Eleventh Circuit's decision in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986). Circuit City dismisses *Cox* as a "passing thought" (Opp. at 19), but it is plainly an alternative holding by the Eleventh Circuit, as is evident from the text of the opinion itself. The conflict between this case and *Cox* is another reason for review by the Court.

3. Circuit City argues that the statistical issues should not be reviewed because they are merely "fact-bound disputes with the Fourth Circuit's assessment of the evidence." Opp. at 24. On the contrary, review is appropriate where a court of appeals persistently invades the province of the fact-finder by reweighing the evidence. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985). And review here is all the more appropriate because the court of appeals made the very same error for which it was previously reversed in *Bazemore v. Friday*, 478 U.S. 385 (1986). In this case, the court of appeals invalidated petitioners' statistical evidence because it erroneously thought a *single* variable — educational level — had been omitted from the regression analyses and surmised (without any basis for doing so) that such a variable would explain the gross disparities in black and white promotion rates. Pet. App. 36a. Under *Bazemore*, such an omission would go to the weight,

not the admissibility, of the evidence. As petitioners previously demonstrated (Pet. 24-25), educational level was in fact considered by both experts and found to be statistically insignificant. Even if that factor had been totally omitted, however, the court of appeals' decision would still be erroneous and a patent violation of the *Bazemore* rule.

4. Circuit City does not dispute that this case presents substantially the same issue as *Kolstad v. American Dental Ass'n*, No. 98-208. Opp. at 25. Taking a "heads-I-win-tails-you-lose" approach, Circuit City argues that it should prevail on this issue regardless of which way the Court decides *Kolstad*. The argument is illogical at best.

The split in the circuits is undisputed. Some courts, like the Fourth Circuit here and the District of Columbia Circuit in *Kolstad*, hold that proof of intentional discrimination alone is not sufficient to permit the jury to award punitive damages. Rather, there must also be evidence of some additional "particularly egregious conduct" to warrant punitive damages. Pet. App. 39a. Other courts hold that proof of intentional discrimination sufficient for compensatory damages is also sufficient to permit the jury to consider — under appropriate instructions — whether punitive damages should be awarded. *See, e.g., Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (§ 1981 cases); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987).[5] In the present case, the Fourth Circuit found that there was sufficient evidence of intentional discrimination and therefore affirmed the compensatory damage awards. The Fourth Circuit also rejected Circuit City's challenge to the jury instructions regarding punitive damages. Yet, despite proper instructions and the jury's finding of systemic as well as specific individual discrimination, the court did not think that there was

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[5] Petitioners believe that this rule is more faithful to *Smith v. Wade*, 461 U.S. 30 (1983), than the *Kolstad* rule.

"particularly egregious conduct" to permit the jury even to consider an award of punitive damages.

The *Kolstad* issue is thus squarely presented. If, as petitioners believe, the *Kolstad* rule is wrong, then the evidence in this case was necessarily sufficient to allow the jury to consider punitive damages, and the court of appeals had no legal basis to interfere with the verdict. In that event, the punitive damage verdict would have to be reinstated. At a minimum, the case would have to be remanded for reconsideration in light of the correct legal standard. An additional factor favoring review is that this case presents the punitive damage issue under 42 U.S.C. § 1981, while *Kolstad* presents it under Title VII. Deciding both cases would allow the Court to harmonize the treatment of punitive damages under the two statutes.

## CONCLUSION

For all the foregoing reasons, petitioners submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

*Of Counsel:*

RODERIC V.O. BOGGS
AVIS E. BUCHANAN
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
1300 19th Street, N.W.
Washington, D.C. 20036

JOSEPH M. SELLERS
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W.
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(202) 663-8000

*Attorneys for Petitioners*

JOHN A. GIBNEY, JR.
SHUFORD RUBIN & GIBNEY
P.O.Box 675
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